

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LARRY TOTTEN, et al.,)	
)	
Plaintiffs,)	No. C06-01907 JSW (BZ)
)	
v.)	REPORT AND RECOMMENDATION
)	FOR ENTRY OF DEFAULT
H.L. HEGGSTAD, INC.,)	JUDGMENT AND AWARD OF
)	ATTORNEYS' FEES
Defendant.)	
)	
)	

On July 5, 2006, the Honorable Jeffrey S. White referred to me for a report and recommendation plaintiffs' motion for entry of default judgment against defendant H.L. Heggstad, Inc. Defendant has never appeared in this action and did not respond to plaintiffs' motion.

On March 13, 2006, plaintiffs, Larry Totten and Jose Moreno in their capacities as trustees of various trust funds¹ and the Northern California District Council of Laborers

¹ Totten and Moreno filed suit in their capacities as trustees of the Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California and Laborers Training and Retraining Trust Fund for Northern California (collectively, "Trust Funds").

1 ("Council of Laborers") for itself and on behalf of Laborers'
2 Local 73, filed a petition and complaint under section 301 of
3 the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185,
4 and section 502 of the Employee Retirement Income Security Act
5 ("ERISA"), 29 U.S.C. § 1132, requesting confirmation of a
6 final and binding arbitration award entered against
7 defendant,² an award of attorneys' fees and other relief.
8 According to the complaint, defendant is bound by a written
9 collective bargaining agreement, the Laborers' Master
10 Agreement and various Trust Agreements (collectively, the
11 "Agreements"), which obligate it to pay Trust Funds the hourly
12 amounts specified for each hour paid or worked by its
13 employees covered by the Agreements and to submit to an audit
14 to determine whether all fringe benefit contributions have
15 been timely paid.³ Compl. ¶¶ VI-VIII.

16 Plaintiffs further allege that because of a dispute over
17 the application or interpretation of the Agreements, a
18 grievance arose between the parties. Compl. ¶ XI. Pursuant
19 to the Agreements, plaintiffs followed the steps outlined in
20 the grievance procedure and ultimately submitted the dispute
21 to the Board of Adjustment (the "Board") for a hearing in
22

23 ² The court has original jurisdiction over the LMRA and
24 ERISA claims. 29 U.S.C. § 185(c); 29 U.S.C. § 1132(e).
25 Pursuant to 28 U.S.C. § 1367(a), the court has supplemental
26 jurisdiction over the claim seeking confirmation of the
arbitration award because it is "so related to claims in the
action within such original jurisdiction that [it] form[s] part
of the same case or controversy."

27 ³ Plaintiffs' counsel's answers at oral argument and
28 the declarations of Andrea Atkins and Nicole Phillips also
establish that defendant is bound by the Agreements.

1 September 2004. Compl. ¶¶ X-XI. Defendant failed to appear.
2 The Board issued an award in favor of plaintiffs by majority
3 vote⁴ requiring defendant to pay plaintiffs sixty-nine hours
4 of wages plus fringe benefits, sixty days waiting time for
5 wages plus fringe benefits and \$50.00 for bounced check fees.
6 See Compl., Ex. C. In addition, the award requires defendant
7 to submit to an audit to determine the fringe benefits due on
8 behalf of all laborers covered who worked for defendant
9 between the date of the last audit and the date of entry of
10 the award. Id. Plaintiffs allege that they have made demands
11 upon defendant to enforce the Board's award, but defendant has
12 refused to comply. Compl. ¶ XIII. Plaintiffs filed this
13 action in part to compel defendant to comply with the Board's
14 award.

15 Plaintiffs served defendant with the complaint on April
16 7, 2006. Defendant did not answer or otherwise defend this
17 action, and the Clerk entered defendant's default on May 9,
18 2006. By its default, defendant has admitted the well-pleaded
19 averments of the complaint. See Fed. R. Civ. P. 8(d).

20 Plaintiffs moved for default judgment, which came on for
21 hearing September 6, 2006 to determine the amount of damages.
22 Defendant failed to appear.

23 Pursuant to Rule 55(b)(2), the court may enter a default
24 judgment against a party against whom default has been
25 entered. The decision to grant or deny a default judgment

26
27 ⁴ Pursuant to the grievance procedure outlined in the
28 Agreements, the participation of an impartial arbitrator was
not required because the Board had reached a majority vote.
See Compl., Ex. A, Laborers' Master Agreement, Section 9.

1 under Rule 55(b) is within the discretion of the court. Eitel
2 v. McCool, 782 F.2d 1470, 1471-1472 (9th Cir. 1986).

3 A court will not examine the merits of a dispute which
4 the parties have submitted to arbitration under an agreement
5 to be bound by the award. Ficek v. Southern Pacific Co., 338
6 F.2d 655 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965).

7 "[I]f, on its face, the award represents a plausible
8 interpretation of the contract in the context of the parties'
9 conduct, judicial inquiry ceases and the award must be
10 affirmed." Holly Sugar Corp. v. Distillery, Rectifying, Wine
11 & Allied Workers International Union, AFL-CIO, 412 F.2d 899,
12 903 (9th Cir. 1969). An arbitrator's award should not receive
13 deference if the decision does not draw its essence from the
14 contract and the arbitrator dispensed his own brand of
15 industrial justice, the arbitrator exceeded the boundaries of
16 issues submitted to him, or the award is contrary to public
17 policy. See Federated Dep't. Stores v. United Foods &
18 Commercial Workers Union, Local 1442, 901 F.2d 1494, 1496 (9th
19 Cir. 1990). None of these exceptions exist in this case, and
20 analyzing the award under this standard, I find that the
21 Board's award is valid and enforceable.

22 The award does not specify dollar amounts for the wages
23 and fringe benefits awarded. To prove these amounts,
24 plaintiffs have submitted a declaration from Cedric Porter,
25 the grievance chairman for the Council of Laborers and the
26 assistant to the business manager. Mr. Porter is responsible
27 for reviewing all district council grievances and is familiar
28 with the district council's file for defendant. Mr. Porter

1 averts that he was present at the hearing before the Board in
2 September 2004 and that the minutes accurately represent what
3 occurred. The Porter declaration establishes that the Board
4 awarded a total of \$8,690.26 in wages and \$4,317.90 in fringe
5 benefit contributions. Porter Decl. ¶ 3.

6 Based upon my review of the record and plaintiffs'
7 counsel's answers at oral argument, I recommend that the
8 Board's award in the minutes dated September 15, 2004 be
9 confirmed and enforced. Pursuant to that award, I recommend
10 that the court order defendant to submit to an audit to
11 determine fringe benefits due on behalf of all covered
12 laborers who worked for defendant in the specified time
13 period and to pay plaintiffs sixty-nine hours of wages plus
14 fringe benefits, sixty days waiting time for wages plus
15 fringe benefits and \$50.00 for bounced check fees, for a
16 total dollar amount of \$8,690.26 in wages, \$4,317.90 in
17 fringe benefit contributions and \$50.00 for bounced check
18 fees.

19 Plaintiffs also seek \$3,727.50 in attorneys' fees and
20 \$389.00 in costs. Reasonable attorneys' fees and costs of
21 the action may be awarded to a Trust Fund that receives a
22 judgment in its favor. See 29 U.S.C. § 1132(g)(2)(D).
23 Concepcion Lozano-Batista, one of the attorneys for
24 plaintiffs, in her Supplemental Declaration in Support of
25 Motion for Default Judgment ("Lozano Decl."), calculates that
26 she along with other attorneys in her firm have billed
27 \$3,600.00 at a rate of \$225.00 an hour for time spent in
28 prosecuting this action. See Lozano Decl. ¶ 2. From these

1 figures, the court has calculated that plaintiffs' attorneys
2 have spent sixteen hours of work on this case. Ms Lozano-
3 Batista further declares that two paralegals, who bill at
4 rates of \$75.00 per hour and \$90.00 per hour respectively,
5 billed \$127.50 for work performed on this case, which is
6 included in the total attorneys' fee request. Id. at ¶ 3. A
7 review of the record and the Lozano declaration indicates
8 that the time spent by plaintiffs' attorneys was reasonable
9 and necessary to seek a court order confirming the Board's
10 award and to obtain a default judgment in their clients'
11 favor, and is therefore recoverable. See 29 U.S.C. §
12 1132(g)(2)(D). The rate charged is also reasonable in
13 relation to the work performed. See id. Plaintiffs also
14 incurred \$389.00 in costs consisting of filing fees and costs
15 associated with service of process. Lozano Decl. ¶ 5.
16 Plaintiffs' request for \$3,727.50 in attorneys' fees and
17 \$389.00 in costs is reasonable and should be awarded.

18 Plaintiffs also request an order that defendant pay all
19 amounts found due and owing as a result of the audit plus
20 interest. However, without the audit, plaintiffs cannot
21 prove up their damages, which is necessary before the court
22 can make such an order part of a default judgment.
23 Therefore, I recommend that this request be denied.

24 Plaintiffs also seek an order directing and permanently
25 enjoining defendant to perform its obligations and timely
26 submit all required monthly contribution reports,
27 contributions due and owing plus interest and liquidated
28 damages. "[T]he bases of injunctive relief are irreparable

1 injury and inadequacy of legal remedies." Amoco Prod. Co. v.
2 Village of Gambell, AK, 480 U.S. 531, 542 (1987); see also
3 Midgett v. Tri-County Metropolitan Transp. Dist. of Oregon,
4 254 F.3d 846, 850 (9th Cir. 2001)("In order to be entitled to
5 an injunction, Plaintiff must make a showing that he faces a
6 real or immediate threat of substantial or irreparable
7 injury."). Plaintiffs have not demonstrated that they face a
8 threat of substantial or irreparable injury nor have they
9 established that their legal remedies are inadequate. In
10 light of the judgment for unpaid contributions and attorneys'
11 fees and costs, I see no need for an affirmative injunction
12 to guarantee compliance with the Agreements. I therefore
13 recommend that the injunctive relief requested by plaintiffs
14 be denied.

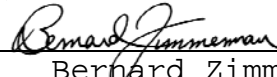
15 Finally, plaintiffs request that the court order an
16 accounting between the parties, but such request is vague and
17 appears to be indistinguishable from an audit. I recommend
18 that the request for an accounting be denied to the extent
19 that it is different from the audit included in the Board's
20 award which I recommended be confirmed.

21 For the reasons set forth above, I recommend that
22 judgment be entered in plaintiffs' favor for \$17,174.66,
23 which includes \$8,690.26 in wages, \$4,317.90 in fringe
24 benefit contributions, \$50.00 in bounced check fees,
25 \$3,727.50 in attorneys' fees and \$389.00 in costs. I also
26 recommend that pursuant to the Board's award defendant be
27 ordered to submit to an audit to determine fringe benefits
28 due on behalf of all covered laborers who worked for

1 defendant from the date of the last audit to the date of
2 entry. In addition, at plaintiffs' request, I recommend that
3 the court retain jurisdiction for six months to enforce such
4 order.

5 I further recommend that plaintiffs' requests for an
6 order enjoining defendant to timely submit all required
7 monthly contribution reports, contributions due and owing
8 plus interest and liquidated damages, an order for an
9 accounting between the parties and an order for defendant to
10 pay contributions due as result of the audit ordered and for
11 interest on amounts due be denied.

12 Dated: September 14, 2006

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14 Bernard Zimmerman
United States Magistrate Judge

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